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SUPREME COURT, U.S.

No. 07-1169

In The Supreme Court of the United States

PAUL ANTHONY RANGOLAN,

Petitioner,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL,

Respondent.

On Petition for A Writ of Certiorari
To the United States Court of Appeals
For The Fourth Circuit

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Linda A. Dominguez, Esquire
Counsel of Record for Petitioner
L A Dominguez Law, LLC
1800 N. Charles Street, Ste 300
Baltimore MD 21201
(410) 685-5550

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Petitioner, Paul Anthony Rangolan submits the following in reply to Respondent's Brief in Opposition:

1. Since the filing of the Petition, the jurisdictional landscape has significantly changed with the issuance on May 8 of the precedent decision from the Board of Immigration Appeals (Board or BIA), in *Matter of V-K-*, 24 I & N Dec. 500 (BIA May 8, 2008). *See also Matter of A-S-B-*, 24 I. & N. Dec. 493 (BIA May 8, 2008) (companion case regarding asylum).[1] In *Matter of V-K-*, the BIA squarely held, contrary to Respondent's position here, that aliens do *not* raise factual claims when they challenge whether, on the historical facts of their case, they satisfied the CAT "more likely than not" standard. (The two BIA decisions are attached here as Addendums.)

As in Mr. Rangolan's case, the alien in *Matter of V-K-* argued that, on the historical facts of the case, he satisfied the CAT "more likely than not" legal standard. The Board explained that although the historical facts were subject to the clear error standard of review, it reviewed de novo mixed questions regarding the application of the "more likely than not" legal standard to the historical facts of the case. The Board thus stated that it reviewed de novo whether the facts of a case were sufficient "to meet the [alien] respondent's burden of proof for protection under the Convention Against Torture."

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[1] Respondent's brief in opposition was filed on May 14, 2008, but did not address the BIA's decisions dated May 8, 2008.

Matter of V-K-, 24 I & N Dec. at 502. The Board further stated that it would "appear essential to the performance of our appellate function as contemplated by the Attorney General that we possess the authority to review de novo findings deemed by an Immigration Judge (IJ) to satisfy an ultimate statutory standard." *Ibid.*[2]

In Mr. Rangolan's case, the BIA overturned the CAT grant by the IJ and did so without expressly indicating what standard of review it was employing, and specifically whether it viewed Mr. Rangolan's claim as factual, subject to the clear error standard. But from the BIA's cursory decision, it is plain that the Board could not have found clear error and that it did not review the CAT grant based on a clearly erroneous standard of review. Yet the Fourth Circuit dismissed the case for lack of jurisdiction, accepting the government's view that the claim was *factual* and thus did not fall within 8 U.S.C. 1252(a)(2)(D)'s reference to "questions of law." Mr. Rangolan was thus whipsawed, with his claim being treated by the Fourth Circuit as factual but by the BIA as subject to *de novo* review.

Respondent understandably does not contend that the same claim can be characterized one way in

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[2] In the companion case, *Matter of A-S-B-*, the BIA addressed the same question regarding the applicable standard of review but in the context of an asylum claim. *See* 24 I & N Dec. at 497 ("The question whether these uncontested facts were sufficient to establish a well-founded fear of persecution . . . was a legal determination that was not subject to the clearly erroneous standard of review.").

the BIA and then an opposite way in the court of appeals. Instead, Respondent contends that the Court should *assume* that the BIA treated Mr. Rangolan's claim as factual and that it viewed the IJ's decision as clearly erroneous. Respondent maintains that this assumption is warranted because the correct standard of review at the Board was the clearly erroneous standard and that, in the absence of a contrary statement in the decision, the Court should presume that the BIA acted correctly. Opp. Br. at 17 (stating that the BIA is entitled to a "presumption of regularity").

Yet now, in light of *Matter of V-K-*, it is clear that the BIA does treat claims like Mr. Rangolan's as subject to de novo review, and not as *factual* challenges subject to the clearly erroneous standard. Thus, if the presumption of regularity governs, the Court must assume that the BIA treated Mr. Rangolan's claim as subject to de novo review. That is also consistent with a proper reading of the Board's decision in Mr. Rangolan's case, which certainly did not explain why the IJ was *clearly* erroneous.

The BIA's recent decision thus strongly supports granting the Petition. Alternatively, the Court should grant the Petition, vacate the Fourth Circuit's decision, and remand with instructions that the court of appeals send the case back to the BIA for clarification on the standard employed by the Board in Mr. Rangolan's case. Indeed, in both *Matter of V-K-* and *Matter of A-S-B-*, the courts of appeals – at the suggestion of the government – remanded the cases to obtain clarification on the

standard employed by the BIA in CAT and asylum cases. At a minimum, the Court should defer consideration of the Petition and direct Respondent to file a response to *Matter of V-K-* (and the companion case *Matter of A-S-B-*).

2. Respondent argues that there is no disagreement among the courts of appeals regarding jurisdiction to review whether an alien's facts satisfy the "more likely than not" standard. That is incorrect. In addition to the cases cited in the Petition, other decisions have reviewed the type of CAT claim raised by Petitioner here. *See DeAlmeida v. Attorney General*, No. 05-3453, 2007 WL 2050870, at **2 (3d Cir. June 18, 2007); *Badewa v. Attorney General*, No. 06-2858, 2007 WL 3193841, at **4 (3d Cir. Oct. 30, 2007). *See also Arteaga v. Mukasey*, 511 F.3d 940, 948-49 (9th Cir. 2007) ("Weighing the evidence, the IJ and the BIA agreed that Arteaga did not meet his burden of showing that more likely than not he would be tortured at the hands of the El Salvadoran government if removed. The evidence in the record does not compel a contrary result.").

Moreover, there is widespread general disagreement over the meaning of the term "questions of law" in Section 1252(a)(2)(D). *Compare, e.g., Jimenez Viracacha v. Mukasey*, 518 F.3d 511, 515 (7th Cir. 2008), *pet. for cert. filed* Apr. 30, 2008 (finding that Section 1252(a)(2)(D) covers only "pure" questions of law), *with Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 331 & n.11 (2d Cir. 2006) (concluding that Section 1252(a)(2)(D) "undeniably can encompass claims of 'erroneous

application or interpretation of statutes'") (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)); *Ramadan v. Gonzales*, 479 F.3d 646, 648 (per curiam) (holding that the court's jurisdiction over "questions of law" "includes not only 'pure' issues of statutory interpretation, but also application of law to undisputed facts"), *reh'g en banc denied*, 504 F.3d 973 (9th Cir. 2007) .

3. Respondent also argues that the pre-REAL ID Act habeas cases are irrelevant. In support of that position, respondent cites *Kamara v. Attorney General,* 420 F.3d 202 (3d Cir. 2005), for the proposition that the REAL ID Act "'radically overhauled' the relevant 'jurisdictional framework.'" Opp. Br. at 19 n.5. But *Kamara* was specifically discussing only the fact that the REAL ID Act transferred review from the district courts to the courts of appeals. Indeed, *Kamara* stated the scope of review under the REAL ID Act, and specifically 8 U.S.C. 1252(a)(2)(D), "mirrors" the scope of review previously available in habeas. *Kamara*, 420 F.3d at 210-11.

Nor can there be any serious question that the reference to "questions of law" in Section 1252(a)(2)(D) was not intended to eliminate any review previously available in habeas. Indeed, Respondent quotes approvingly from a Tenth Circuit decision making that precise point. Opp. Br. at 15-16. *See also Chen*, 471 F.3d at 326-27.

4. Respondent notes that the Fourth Circuit granted the government's jurisdictional motion to dismiss without an opinion. But the Fourth Circuit

has now spelled out its jurisdictional reasoning in *Saintha v. Mukasey*, 516 F.3d 243 (4th Cir. 2008), *reh'g en banc denied.*

5. Respondent contends (at 16) that Petitioner waived an ancillary argument regarding the court of appeal's jurisdiction to review the BIA's standard of review. But whatever the force of that waiver argument, Petitioner's central argument – which he has consistently pressed -- is that his CAT claim raises a legal challenge for purposes of review by the court of appeals under 8 U.S.C. 1252(a)(2)(D). In his *en banc* Petition, Petitioner elaborated on that argument by noting that it was highly unlikely the BIA actually employed a "clear error" standard given its failure to say so and the cursory nature of its opinion. In any event, the BIA in *Matter of V-K-* has now clarified that, contrary to Respondent's position, it does not view the type of CAT claim raised by Mr. Rangolan as factual.

6. Finally, Respondent seeks to minimize the merits of Mr. Rangolan's CAT claim. Opp. Br. at 19-20. Yet the IJ granted him CAT and the BIA's two-page decision overturning the IJ's decision was cursory and unreasoned. Indeed, the BIA itself subsequently found in another case that Jamaica has a horrendous record of abusing homosexuals. The government's suggestion that the cases had different records misses the larger point made by the subsequent BIA decision, which is that in general homosexuals are not safe in Jamaica because of government policies and acquiescence in brutal conduct. Pet. at 9 (discussing the subsequent BIA CAT decision). If anything, Mr. Rangolan faces

far worse danger because he is suffering from AIDS. For the same reason, Respondent's contention that Mr. Rangolan would not have qualified for a stay under the ordinary preliminary injunction standard is incorrect.[3]

CONCLUSION

The Petition should be granted. However, if the Court concludes that full review is premature at this time, it should grant, vacate and remand to the court of appeals, with instructions to obtain clarification on the standard of review employed by the BIA in Mr. Rangolan's case. Alternatively, consideration of the Petition should be deferred and the Court should direct Respondent to file a response to the BIA's May 8 decision in *Matter of V-K-*. Finally, if the Court does not adopt any of the foregoing options, it should hold this Petition until it disposes of the petition in *Jimenez Viracacha v. Mukasey*, No. 07-1363, which raises the same threshold question regarding the meaning of "questions of law" in 8 U.S.C. 1252(a)(2)(D).

[3] Moreover, on the stay issue and Mr. Rangolan's equities, Respondent fails to note Petitioner's significant cooperation with the government. Indeed as noted by AUSA Ann Carroll in her letter dated September 26, 2006, "[h]ad Mr. Rangolan not come forward, the government may never have known of the jury tampering or the plot to kill the eyewitness in the Ellis/Fortson murder case.... Because of Mr. Rangolan's cooperation, the government has successfully prosecuted five individuals who are currently serving substantial sentences." Pet's Opp. to Govt. Mot. To Dismiss, Exh. F (4th Cir.).

Respectfully submitted,

LINDA A. DOMINGUEZ
Counsel of Record for Petitioner
1800 N. Charles Street, Ste. 300
Baltimore MD 21201
(410) 685-5550

ADDENDUM A

Cite as 24 I&N Dec. 493 (BIA 2008)
Interim Decision #3608

Matter of A-S-B-, Respondent
Decided May 8, 2008
U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

(1) Under 8 C.F.R. § 1003.1(d)(3) (2008), the Board of Immigration Appeals should defer to the factual findings of an Immigration Judge, unless they are clearly erroneous, but it retains independent judgment and discretion, subject to applicable governing standards, regarding pure questions of law and the application of a particular standard of law to those facts.
(2) In determining whether established facts are sufficient to meet a legal standard, such as "well-founded fear," the Board has the authority to weigh the evidence in a manner different from that accorded by the Immigration Judge, or to conclude that the foundation for the Immigration Judge's legal conclusions was insufficient or otherwise not supported by the evidence of record.

FOR RESPONDENT: Christopher J. Stender, Esquire, San Francisco, California
FOR THE DEPARTMENT OF HOMELAND SECURITY: Deborah K. Goodwin, Assistant Chief Counsel
BEFORE: Board Panel: OSUNA, Acting Chairman; HOLMES and GRANT, Board Members.

OSUNA, Acting Chairman:

In an order dated October 16, 2007, the United States Court of Appeals for the Ninth Circuit granted the Government's unopposed motion to remand the respondent's case to the Board. Upon review of our prior decisions pursuant to the court's order, we will again dismiss the respondent's appeal.

I. FACTUAL AND PROCEDURAL HISTORY

The respondent is a native and citizen of Guatemala who illegally entered the United States in 1990. On December 12, 2003, an Immigration Judge found him removable as charged and granted him asylum. The decision fully discusses the respondent's claim, which we briefly summarize here. In 1989, the respondent worked as a gas station attendant in Guatemala. One day, two truckloads of guerrillas approached him at work and demanded free gas under *494 the threat of kidnaping and forced recruitment or other consequences. The respondent complied and the guerrillas departed. The respondent was too scared to return to work and left for the United States the following year. The respondent feared that upon return to Guatemala, he would be harmed by guerrillas as a result of the 1989 incident, and by the military because he did not report for compulsory military service when eligible in 1986. He also feared that authorities would discover the 1989 incident and persecute him as a suspected guerrilla or guerrilla supporter.

The Immigration Judge found that the respondent did not establish past persecution, or a well-founded fear of persecution, related to the guerrillas or like forces. He did conclude, however, that the respondent would likely be singled out for persecution by the military in Guatemala because the authorities would question him upon his return, discover the 1989 incident, and mistreat him as a result. The Immigration Judge considered evidence in the record from the Department of State indicating that Guatemalan security forces engaged in serious human rights abuses. The Department of Homeland Security ("DHS") filed an appeal, emphasizing the lack of objective evidence in the record to support the Immigration Judge's grant of asylum.

In a decision dated November 19, 2004, we agreed with the Immigration Judge that the respondent did not experience past persecution on account of any protected ground. We did not, however, concur that the respondent established a reasonable possibility that he would face persecution from the military upon return to Guatemala. Rather, we agreed with the DHS that the Immigration Judge's conclusion that the authorities would discover the 1989 incident and single the respondent out for persecution on this basis was purely speculative. We also considered the evidence of record that the Guatemalan civil war ended in 1996, and that the politically motivated violence feared by the respondent had abated. We pointed out that the respondent had not provided countervailing evidence to show that his fear remained reasonable despite these conditions. The record was remanded for the Immigration

Judge to address the respondent's request for withholding of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted and opened for signature* Dec. 10, 1984, G.A. Res. 39/46. 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988) ("CAT"). *See* 8 C.F.R. § 1208.16 (2004).

On remand, the Immigration Judge, without objection from the parties, considered the facts established at the prior hearing, as well as updated evidence of country conditions provided by the DHS. In a decision dated October 6, 2005, he concluded that the respondent did not meet his burden of proof under the CAT that it was more likely than not that he would be tortured upon return to Guatemala and granted him voluntary departure. The *495 respondent filed an appeal which raised several matters, including his assertion that in our November 19, 2004, decision, we did not review the Immigration Judge's findings of facts under the clearly erroneous standard of review and that we engaged in improper fact-finding on appeal.

We dismissed the appeal in a decision dated October 5, 2006, explaining that we had utilized the correct standard of review in our prior decision because we concluded, as a matter of law, that the facts of the respondent's case did not establish a well-founded fear of persecution within the meaning of the Immigration and Nationality Act. Insofar as the respondent contended that he did not have an adequate opportunity to rebut the evidence of country conditions referred to in our decision, we responded that the pertinent evidence, namely

reports issued by the State Department, had been in the record at the time of his hearing.[1]

The respondent filed a petition for review with the Court of Appeals for the Ninth Circuit. On October 16, 2007, the court, without any specific directives, granted the Government's unopposed motion to remand, which requested a remand to

> allow the Board to provide clarification and elaboration on the scope of review it employed (in its November 19, 2004 decision reversing the immigration judge's grant of asylum) to review the question of whether [the respondent] demonstrated a well-founded fear of persecution in Guatemala. Specifically, remand will allow the Board an opportunity to clarify and elaborate on its characterization (in its October 5, 2006 decision) of the ultimate "well-founded fear" issue as presenting a question of law warranting a *de novo* standard of review pursuant to 8 C.F.R. § 1003.1(d)(3)(ii) (2007).

II. STANDARD AND SCOPE OF REVIEW

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[1]The respondent also asserted that the Government had the burden of showing that country conditions had changed to a degree that undermined his claim of a well-founded fear. Although the Government carries this burden of proof when past persecution has been established, there was no such finding in this case. *See* 8 C.F.R. § 1208.13(b)(1)(ii) (2008); *see also Matter of D-I-M-*, 24 I&N Dec. 448 (BIA 2008). Therefore, the burden of proof to establish asylum eligibility rested squarely with the respondent. *See* 8 C.F.R. § 1208.13(a).

In 2002, the Attorney General issued a procedural reforms regulation, which, in part, related to the standard of review applied by the Board and the scope of its review of decisions by the Immigration Judges. *See* Board of Immigration Appeals: Procedural Reforms To Improve Case Management, *496 67 Fed. Reg. 54,878 (Aug. 26, 2002). The provision entitled "Scope of review" stated the following:

> (i) The Board will not engage in *de novo* review of findings of fact determined by an immigration judge. Facts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous.
>
> (ii) The Board may review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges *de novo.*
>
> (iii) The Board may review all questions arising in appeals from decisions issued by Service officers *de novo.*
>
> (iv) Except for taking administrative notice of commonly known facts such as current events or the contents of official documents, the Board will not engage in factfinding in the course of deciding appeals. A party asserting that the Board cannot properly resolve an appeal without further factfinding must file a motion for remand. If further factfinding is needed in a particular case, the Board may remand the proceeding

> to the immigration judge or, as appropriate, to the Service.

67 Fed. Reg. at 54,902 (codified at 8 C.F.R. § 3.1(d)(3), which was transferred to 8 C.F.R. § 1003.1(d)(3) in 2003); *see also Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002).[2]

The Supplementary Information to this regulation contained an extensive discussion about the interplay of the clearly erroneous standard of review and the Board's de novo review authority.[3] It explained that the Board should defer to the factual findings of an Immigration Judge, unless they are clearly erroneous, but that it retains independent judgment and discretion, subject to applicable governing standards, regarding pure questions of law and the application of a particular standard of law to those facts. 67 Fed. Reg. at 54,888-89 (Supplementary Information). The clearly erroneous standard therefore does not apply to the application of legal standards, such as whether the facts established by an alien "amount to 'past persecution' or a 'wellfounded fear of persecution.'" *Id.* at 54,890. This analytical approach to deciding cases recognizes that the Immigration Judges are better positioned to discern credibility and assess

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[2] The clearly erroneous standard of review in 8 C.F.R. § 1003.1(d)(3)(i) applies to appeals filed on or after September 25, 2002, and the remaining sections of the regulation apply to appeals pending on that date. *See Matter of S-H-*, *supra*, at 464 n.2.

[3] Legal determinations made by the Attorney General in the Supplementary Information to a rule are binding on the Board. *See Matter of A-A-*, 20 I&N Dec. 492, 502 (BIA 1992); *see also* 67 Fed. Reg. at 54,884 n.4 (Supplementary Information).

the facts with witnesses before them, but that the Board is better positioned to resolve issues involving the application of legal standards and the exercise of discretion. *Id.*

The Attorney General provided specific examples to show how the standard of review should be applied. For example, the Immigration Judge's *497 assessment of what happened to an asylum applicant is a factual determination that will be reviewed under the clearly erroneous standard. *See* 67 Fed. Reg. at 54,890 (Supplementary Information). The questions whether the facts demonstrate harm that rises to the level of persecution and whether the harm was inflicted "on account of" a protected ground, however, "are questions that will not be limited by the 'clearly erroneous' standard." *Id.* In the context of an application for cancellation of removal, the facts that a respondent alleges to support a claim of "exceptional and extremely unusual hardship" to a relative and to establish the status of that person as a qualifying relative are reviewed by the Board only to determine if the Immigration Judge's finding was clearly erroneous. *Id.* After the Board has determined that the Immigration Judge's findings regarding the facts underlying the hardship claim are not clearly erroneous, it may review de novo whether the facts support a conclusion that the hardship rises to the required level. *Id.* Similarly, the Board may review de novo the question whether a favorable exercise of discretion is warranted in a given case. *See Noble v. Keisler*, 505 F.3d 73 (2d Cir. 2007) (holding that the Board has the authority to reach a different result on discretion than that reached by the Immigration Judge).

III. APPLICATION OF THE REGULATIONS

In this case, the Immigration Judge found in his December 12, 2003, decision that the respondent presented credible testimony. We did not find this determination to be "clearly erroneous." The predicate facts presented by the respondent, namely what happened to him when he was in Guatemala, were the basis for our decision when we evaluated the respondent's case on appeal. The question whether these uncontested facts were sufficient to establish a well-founded fear of persecution, however, was a legal determination that was not subject to the clearly erroneous standard of review. This mode of evaluation is in accord with the standard for review set out in 8 C.F.R. § 1003.1(d)(3) and explicated in the Supplementary Information published in the Federal Register. This is why we characterized the well-founded fear finding as a "matter of law" in our prior decision. *See Recinos De Leon v. Gonzales*, 400 F.3d 1185, 1194 (9th Cir. 2005) (stating that on remand, the Board may decide legal issues in the case based on the respondent's testimony, which was to be taken as true).

In determining whether established facts are sufficient to meet a legal standard, such as "well-founded fear," the Board is entitled to weigh the evidence in a manner different from that accorded by the Immigration Judge, or to conclude that the foundation for the Immigration Judge's legal conclusions was insufficient or otherwise not supported by the evidence of record. In this vein, we found in our November 19, 2004, decision that the

*498 Immigration Judge's legal conclusion that the respondent established a well-founded fear was not supported by the facts of record. Rather, the Immigration Judge rested his conclusion on speculative findings about what may or may not occur to the respondent in the future. This is not fact-finding, because, among other reasons, it is impossible to declare as "fact" things that have not yet occurred. *Cf. Huang v. U.S. INS*, 421 F.3d 125, 129 (2d Cir. 2005) (finding that in the absence of solid support in the record for the alien's assertion that he will be subject to persecutory action upon return to his native country, his fear is speculative at best); *see also Matter of J-F-F-*, 23 I&N Dec. 912 (A.G. 2006) (finding that a CAT claim cannot be granted by stringing together a series of suppositions). We therefore conclude that we acted within our authority in determining that the Immigration Judge's finding of a well-founded fear was not supported by the record and that the respondent did not meet his burden of proof to satisfy the legal requirements for asylum.

We further find that neither of our prior decisions in this case violated the prohibition against fact-finding on appeal, as set out in 8 C.F.R. § 1003.1(d)(3)(iv). We relied on the predicate facts found by the Immigration Judge and did not evaluate any "new" evidence submitted on appeal. The State Department information discussed in our November 19, 2004, decision regarding the end of the civil war in Guatemala had been admitted into evidence at the hearing without objection by the respondent. The Immigration Judge's failure to explicitly discuss the end of the civil war and related issues in his decision did not render our

mention of them to be improper fact-finding on appeal, especially considering that the end of the war is an uncontested event.[4] Were we to treat the matter otherwise, we would be precluded from considering the total content of any documentary evidence submitted before the Immigration Judge unless the entire document was read into the Immigration Judge's decision. We find no indication that this was the Attorney General's intention when the procedural reforms regulations were promulgated. *See Rotinsulu v. Mukasey*, 515 F.3d 68, 73 (1st Cir. 2008) (finding that 8 C.F.R. § 1003.1(d)(3)(iv) was not intended to restrict the Board's power to weigh and evaluate evidence already presented before the Immigration Judge). *499

III. CONCLUSION

In conclusion, for the reasons stated in our prior decisions in this case, we find that the respondent did not establish as a matter of law that he should be granted asylum or withholding of removal under either the Act or the CAT. Accordingly, upon clarification of our prior decisions, the respondent's appeal will again be dismissed.

ORDER: The appeal is dismissed.

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[4] We also properly found that the portions of the State Department report discussing the end of the civil war were more persuasive in relation to the respondent's claim than those concerning general human rights violations, on which the Immigration Judge focused in finding that the respondent met his burden of proof for asylum.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security (DHS). *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 1240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the DHS, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

ADDENDUM B

Cite as 24 I&N Dec. 500 (BIA 2008)
Interim Decision #3609

Matter of V-K-, Respondent
Decided May 8, 2008
U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

The Board of Immigration Appeals reviews de novo an Immigration Judge's prediction or finding regarding the likelihood that an alien will be tortured, because it relates to whether the ultimate statutory requirement for establishing eligibility for relief from removal has been met and is therefore a mixed question of law and fact, or a question of judgment.

FOR RESPONDENT: Thomas E. Moseley, Esquire, Newark, New Jersey
FOR THE DEPARTMENT OF HOMELAND SECURITY: Bruce B. Dizengoff, Assistant Chief Counsel
BEFORE: Board Panel: FILPPU, COLE, and PAULEY, Board Members.
PAULEY, Board Member:

In a decision dated April 27, 2004, an Immigration Judge granted the respondent's request for deferral of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted and opened for signature* Dec. 10, 1984, G.A. Res. 39/46. 39 U.N. GAOR Supp.

No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988) ("Convention Against Torture"). The Department of Homeland Security ("DHS") appealed the decision of the Immigration Judge.[1] On August 4, 2006, we sustained the DHS's appeal and ordered the respondent removed from the United States to Ukraine. The respondent appealed our decision to the United States Court of Appeals for the Third Circuit, in whose jurisdiction this case arises.

On September 10, 2007, the Third Circuit granted the Government's unopposed motion to remand proceedings to the Board. In its remand, the Third Circuit instructed us to specify whether we had the authority under 8 C.F.R. § 1003.1(d)(3) to reverse the Immigration Judge's determination that "'there [was] a preponderance of evidence in the record leading to a justification for a clear probability finding that this particular respondent, as *501 a Jewish refugee from the former Soviet Union generally, and the Ukraine specifically, is likely to be targeted at least in part, by both governmental and non-governmental entities within the Ukraine should he be removed to that country . . . [and that such mistreatment will rise to the level of torture].'" In addition, the court asked us to specify whether we had authority to affirmatively find that the petitioner had failed to show a clear probability that he would be tortured if he returned to Ukraine or

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[1]We note that this case involved additional proceedings relating to questions of the respondent's removability that are not relevant to the issues discussed in this decision.

that the torture would occur by or with the acquiescence of government officials.

In his decision, the Immigration Judge credited the testimony of the respondent's expert witness that the respondent "is likely to need to come into contact with governmental entities and is likely to be a target for extortion and mistreatment that is likely to rise to the level of torture." We now clarify that while we reviewed the Immigration Judge's factual rulings for clear error, we do not consider a prediction of the probability of future torture to be a ruling of "fact." Although predictions of future events may in part be derived from "facts," they are not the sort of "[f]acts determined by the Immigration Judge" that can only be reviewed for clear error. 8 C.F.R. § 1003.1(d)(3)(i) (2008).

According to the regulations prescribing the Board's scope of review, facts found by an Immigration Judge can be reviewed only to determine if they are "clearly erroneous," but the Board "may review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges *de novo*." 8 C.F.R. §§ 1003.1(d)(3)(i)-(ii). Furthermore, the regulatory history surrounding the regulations, which were promulgated in 2002, indicates that there was no intent to apply the restrictive "clearly erroneous" test to mixed questions of fact and law where the so-called "fact" consists of a finding as to the degree of possibility of a result occurring that is necessary to sustain a statutory basis for eligibility (e.g., the extent of hardship or the chance of persecution or torture if the alien is removed). Board of Immigration Appeals: Procedural Reforms To Improve Case Management, 67 Fed. Reg. 54,878

(Aug. 26, 2002). The comments accompanying the regulations explain, for example, that "[t]he 'clearly erroneous' standard does not apply to determinations of matters of law, nor to the application of legal standards, in the exercise of judgment or discretion. This includes judgments as to whether the facts established by a particular alien amount to 'past persecution' or a 'well founded fear of persecution.'" *Id.* at 54,890 (Supplementary Information). Accordingly, we conclude that an Immigration Judge's prediction or finding regarding the likelihood that an alien will be tortured may be reviewed de novo because, like a conclusion relating to whether a statutorily prescribed chance of persecution or level of hardship *502 exists, it relates to whether the ultimate statutory requirement for establishing eligibility for relief was met and is therefore a mixed question of fact and law, or a question of "judgment." 8 C.F.R. § 1003.1(d)(3)(ii).[2]

In reviewing the record, we disagreed with the Immigration Judge's mixed factual and legal determination that a preponderance of the evidence showed that it was more likely than not that the

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[2] The fact that the Immigration Judge's prediction derived from his acceptance of an expert witness's testimony does not affect its nature as a prediction relating to whether an ultimate legal standard, here the likelihood of torture, has been met. Indeed, our conclusion that a de novo standard applies here is supported by the nature of expert witness opinion evidence itself. As reflected in Rule 702 of the Federal Rules of Evidence, such expert opinion testimony, while undoubtedly a form of evidence, does not purport to be evidence as to "fact" but rather is admissible only if "it will assist the trier of fact to understand the evidence or to determine a fact in issue."

respondent would be tortured in the Ukraine, as that term has been interpreted by Board and Third Circuit case law. In so doing, we did not find any facts ourselves but only assessed the facts as found by the Immigration Judge and established by the evidence entered into the record, determining that they were insufficient to meet the respondent's burden of proof for protection under the Convention Against Torture. We believe that we acted in accordance with the relevant regulations and our role as an appellate body. 8 C.F.R. § 1003.1(d)(3). Indeed, it would appear essential to the performance of our appellate function as contemplated by the Attorney General that we possess the authority to review de novo findings deemed by an Immigration Judge to satisfy an ultimate statutory standard.

Accordingly, upon clarification of our prior decision, we will again sustain the DHS's appeal, dismiss the respondent's appeal, and order the respondent removed from the United States.

ORDER: The appeal of the Department of Homeland Security is sustained.

FURTHER ORDER: The respondent's appeal is dismissed.

FURTHER ORDER: The respondent is ordered removed from the United States to Ukraine.